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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF ARIZONA**

9 Robert Steven Cutler, et al.,
10 Plaintiffs,

11 v.

12 Chris Nanos, Sheriff Pima County, et al.,
13 Defendants.
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Case No. 18-CV-00383-JCH

**PLAINTIFFS' MOTION TO MODIFY
JOINT PRETRIAL ORDER**

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16 Plaintiffs move under Fed. R. Civ. P. 16(e) to modify the parties' joint pretrial order
17 (Doc. 188) to confirm that Plaintiffs seek punitive damages in this matter, based on this
18 Court's ruling that Plaintiffs were required to state their intent to seek damages for punitive
19 damages in the pretrial order.

20 Under Rule 16(e), the Court "may modify the order issued after a final pretrial
21 conference . . . to prevent manifest injustice." It would be manifestly unjust to eliminate
22 Plaintiffs' punitive damages claim here when, as explained in Doc. 240 which is incorporated
23 herein by this reference:

- 24 • Plaintiffs' Prayer for Relief sought punitive damages;
- 25 • Plaintiffs' Amended Complaint sought punitive damages;
- 26 • Defendants knew Plaintiffs were seeking punitive damages and contended in their
27 Answer that Plaintiffs weren't entitled to punitive damages; and
- 28 • Courts in this circuit have consistently allowed juries to decide punitive damages

1 claims if the evidence set forth at trial justifies punitive damages. *See e.g., Preayer v.*
2 *Ryan*, 2017 WL 2351601, *6 (D. Ariz. May 31, 2017) (“Rule 54 instructs courts that
3 every ‘final judgment should grant the relief to which each party is entitled, even if the
4 party has not demanded that relief in its pleadings.’”) (quoting Fed. R. Civ. P. 54(c));
5 *Cancellier v. Federated Dep’t Stores*, 672 F.2d 1312, 1319 (9th Cir. 1982) (no specific
6 prayer for punitive damages is needed); *Red Rock Communications, Inc. v. Am.*
7 *Telecasting, Inc.*, 2006 WL 2432628, *5 (D. Nev. Aug. 21, 2006) (“Under Rule 54(c),
8 Red Rock’s failure to seek punitive damages on the remaining claims does not preclude
9 a judgment awarding punitive damages.”).

10 Factors to consider in determining whether to modify an order include “(1) the
11 prejudice or surprise in fact to the opposing party; (2) the ability of the party to cure the
12 prejudice; (3) the extent of disruption of the orderly and efficient trial of the case; and (4) the
13 bad faith or willfulness of the non-compliant party.” *Rapco, Inc. v. Comm’r*, 85 F.3d 950, 953
14 (2d Cir. 1996). “Prejudice to the party seeking amendment or modification of the order is also
15 relevant, as a trial court should not refuse to modify a pre-trial order where manifest injustice
16 will result.” *Id.*, citing Rule 16(e). Moreover, “[d]istrict courts should generally allow
17 amendments of pre-trial orders when no substantial injury will be occasioned to the opposing
18 party, the refusal to allow the amendment might result in injustice to the movant, and the
19 inconvenience to the court is slight.” *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27–28
20 (9th Cir. 1980).

21 Here, there is no prejudice to Defendants in modifying the order since they have known
22 since the outset of this matter that Plaintiffs seek punitive damages, and the law of this circuit
23 is clear that the issue of punitive damages should go to the jury when the evidence supports
24 such a claim. *See e.g. Preaver, etc., supra*. Moreover, there will be no substantial injury to
25 Defendants caused by the modification; including a punitive damages claim will not disrupt
26 the orderly and efficient trial of this case; there is no evidence of bad-faith or willful conduct
27 by Plaintiffs; refusing to allow modification would result in injustice to Plaintiffs, in that it
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1 would eliminate an element of Plaintiffs' damages claim; and there is no inconvenience to the
2 Court in allowing the modification. Accordingly, the Court should allow Plaintiffs to modify
3 the joint pretrial in-order to confirm that Plaintiffs seek punitive damages in this matter.

4 RESPECTFULLY SUBMITTED this 1st day of November, 2022.

6 **ZWILLINGER WULKAN, PLC**

7 By: /s/ Jennifer Allen
8 Scott H. Zwillinger
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12 Attorney for Plaintiffs

13 **CERTIFICATE OF SERVICE**

14 I hereby certify that on November 1, 2022, I caused the foregoing document to be filed
15 electronically with the Clerk of Court through the CM/ECF System for filing; and served on all
16 counsel of record via the Court's CM/EDF system.

17 /s/ Tricia Jochum
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